IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 5765 of 1987

For Approval and Signature:

Hon'ble MR.JUSTICE P.B.MAJMUDAR

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES
   yes

2. To be referred to the Reporter or not? Yes
   (bracketed portyion):

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO
   no.

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO
   no

5. Whether it is to be circulated to the Civil Judge? : NO
   no

MAHENDRA KIRPASHANKER JOSHI

Versus

STATE OF GUJARAT

Appearance:

MRS KETTY A MEHTA for Petitioner

MR S.T MEHTA AGP FOR Respondent No. 1

NOTICE SERVED for Respondent No. 2

CORAM : MR.JUSTICE P.B.MAJMUDAR

Date of decision: 24/11/1999

ORAL JUDGEMENT

#. This is a petition under Article 226 of the Constitution of India by which the petitioner has challenged the order dated 11.8.1987 compulsorily retiring him from service passed by the Secretary,

Industries, Mines and Energy Department, Government of Gujarat.

#. The petitioner was appointed as Assistant Director of Industries as a direct recruit in the Industries Department, Government of Gujarat. He was appointed as a direct recruit by the order 29.11.1969 and after being selected by the Gujarat Public Service Commission, he was appointed on the said post with effect from February 26,1970. He had put in 17 years service. The petitioner was promoted to the post of Deputy Director of Industries, which is a Class-I post under the administrative control of Industries Commissioner. The petitioner worked on the aforesaid post of Deputy Commissioner of Industries from June 16,1981 to August 24,1987 . While he was serving on the said post of Deputy Commissioner of Industries by the order at Annexure.B the petitioner was ordered to be retired compulsorily from Government Service.

#. At the time when the petitioner was subjected to the aforesaid order of compulsory retirement, he was holding the post of Deputy Commissioner of Industries under the Commissioner of Industries and performing his duties as Deputy Controller, Weights and Measures, Ahmedabad. Said order was passed from the date of delivery of the order to the petitioner. The petitioner was also ordered to be paid a sum equivalent to his pay and allowances for 3 months in lieu of 3 months notice. Aforesaid order is passed under clause (aa) of sub-rule (1) of Rule 161 of the BCSRS. 1959.

#. At the time of hearing of this petition, Mrs. Mehta for the petitioner has challenged the impugned order on the following grounds:

1) As per Government Resolution along with its Appendix at Annexure.A to the petition,the petitioner's case could not have been reviewed till the petitioner attains the age of 55 years as the age limit for appointment of Deputy Commissioner of Industries is upto 40 years. The petitioner had also not completed 20 years service in Government and therefore also his case could not have been reviewed till that period.

2) That the impugned order suffers from total non application of mind and is based on

extraneous grounds without proper assessment of service record of the petitioner. That the petitioner was communicated the last entry in service record for the year 1985-86 on 8.7.1987 and before the petitioner could make representation within the stipulated period, order of compulsory retirement was passed against the petitioner. That the said order is absolutely bad in law and that part of the entry in the service record could not have been taken into consideration since the petitioner was ordered to be retired compulsorily before allowing the petitioner to make representation against the said entry in his service record within stipulated time.

3) That the service record of the petitioner was not such by which it can ever be said that the petitioner was a dead wood or that he cannot be continued in Government service.That the whole service record of the petitioner can be said to be satisfactory and the petitioner was also mentally fit and therefore, since his performance was not 'below average' he should not have been compulsorily retired.

#. Mrs. Mehta has placed strong reliance on Government Resolution dated 28.7.1987 at Annexure.A issued for the purpose of compulsorily retiring the Government servants for which criteria has been prescribed under clause (aa) of Rule 161(1) of BCSRs. Clause 2 of the said Resolution reads as under:

" A question of issuing a consolidated Government order in lieu of various orders was under consideration. Accordingly, Government is pleased to direct that while considering the cases of premature retirement of Government servants on their attaining the age of 50 or 55 years under clause(aa) of Rule 161(1) of the BCSRs. or their retention beyond that age, the instructions contained in Appendix A to this Resolution should be henceforth followed"

Appendix-A to the said Resolution deals with review of cases and as to when the review should be made. Statement-1 has also been annexed with the said Appendix-A on page 20 of the petition showing the

categories of posts and age at which the review will be necessary in terms of clause (aa) of Rule 161(1) of BCSRs. It has also been prescribed in the said Appendix-A that the review should be done 6 months prior to the officer attains the age of 50 years of 55 years as the case may be. In Statement-1 under the 'remarks' column it has been provided as under:

1. While deciding whether review at the age of 50/55 is necessary or not, the following facts should be taken into account.

i) if the age limit for the purpose of direct recruitment is below 35 years, review should be done both at 50 & 55 years.

ii) if the age limit for purpose of direct recruitment to the post in question is below 40 years, review at 50 is not necessary while at 55, it is necessary.

iii) if the age limit for the purpose for direct recruitment is 40 years or above, review at 50 or 55 is not necessary.

#. The respondents have not filed any affidavit in reply controverting the averments made in the pe4tition. However, Mr. S.T.Mehta, learned AGP for the respondent State has argued that the age limit of 40 years attached to the post in question is for direct recruits and not for promotees and since the petitioner was promoted to the post of Deputy Commissioner of Industries it was not necessary to wait up to the age of 55 years for reviewing the case of the petitioner and therefore, the respondent authorities are justified in reviewing the case of the petitioner for the purpose of compulsorily retiring the petitioner at the age of 50 as the age of 40 years is pres[[cribed in the Recruitment Rules is only for direct recruits. As against this Mrs. Mehta submitted that so far as the age limit of 40 years prescribed in the Recruitment Rule is concerned, it has a reference to the post and not to the person and therefore, recruitment to the post in question can be made upto the age of 40 years. Therefore, it cannot be said that the criteria of [A age limit of 40 or 35 as the case may be , is qua the employee but it is as such can be said to be qua the post in question. Further according to Mrs. Mehta, if on the

same post if the review is made for one person at the age of 55 years and another at the age of 50 years, it would result into discrimination.

#. Now, so far as the appointment to the post in question is concerned, the same can be made either by direct recruitment or by promotion and for the purpose of appointment by direct recruitment, the candidate must be not more than 40 years of age unless already in the service of Government of Gujarat. Therefore as per the guidelines, the age limit for direct recruitment for the post in question is below 40 years and therefore, review at the age of 50 is not necessary while review at the age of 55 is necessary. If the age limit for the purpose of direct recruitment is below 35 years, review should be done both at 50 & 55 years. The petitioner was retired compulsorily from the post of Deputy Commissioner of Industries and appointment of a candidate on the said post by direct recruitment can be made if the candidate is below 40 years and when the petitioner was appointed as such on the post in question, naturally, review at the age of 50 is not necessary and it could have been done at the age of 55 years. If a case is taken in review at the age of 50 years, the age limit prescribed for direct recruitment for the post in question should be below 35 years. That is not the case here. So far as the post of Deputy Commissioner of Industries is concerned, the appointment can be made upto the age of 40 years and therefore, the review should have been made at the age of 55 years and not at the age of 50. Thus the age limit is attached to the post and not to the person. Therefore, no distinction can be made between two sets of employees viz. direct recruits and promotes for the purpose of review. In the instant case the petitioner was appointed as Deputy Commissioner of Industries and therefore, the case of the petitioner could have been reviewed at the age of 55 years since the criteria for appointment to the said post is below 40 years. Thus considering the submissions of both the sides, I am of the opinion that so far as the criteria of age limit for reviewing the case is concerned, it would naturally be limited to the post in question and not qua the person. However, Mr. S.T.Mehta, learned AGP has argued that since, for promotes, there is no age limit prescribed and for direct recruit age limit prescribed is upto 40 years, it has a bearing regarding length of service and therefore, if a promote who has put in long years of service as compared to a direct recruit who might have been recruited even at the age of 40 years, it is not necessary to wait upto the age of 55 years in case of a promote to review his case

who might have put in long years of service and therefore, the classification between direct recruits and promotes for reviewing cases is rational. However, no material whatsoever has been placed on record to substantiate this say. No affidavit in reply has been filed by the Government in this case. Therefore, in the absence of any particular data or material, it is not possible to accept the aforesaid contention. It is also the say of the petitioner that he has not put in total 20 years of service but he had put in only 17 years service and therefore, also assuming that his case could have been reviewed at the age of 50 years, then also atleast he should have been allowed to complete 20 years service before reviewing his case.

#. Therefore, in the facts and circumstances , the impugned decision of the Government for reviewing the case of the petitioner when the petitioner had completed only 17 years service or that he has not completed the age of 55 years is bad in law. However, assuming that the case of the petitioner could have been reviewed at the age of 50 and even before the petitioner completes 20 years service, then also the impugned order deserves to be quashed and set aside on the ground of total non application of mind.

{#. So far as the second point is concerned, it has been stated by the petitioner in para 4 of the petition that during the past 10 years of service on the aforesaid post, the period from June 1976 till July 1987, the petitioner's service record is rated as "good" by two different officers for the period from 1.4.75 to 17.2.76 and 1.4.83 to 31.3.84. The petitioner was not communicated any adverse remark for the period from 1.4.82 to 31.3.83 and therefore, it was presumed that it must be "good" because if it was adverse, it would have been communicated to the petitioner. Thereafter, for the period between 31.3.82 to 27.12.82 and 1.4.84 to 31.3.84 the remark was 'average' and for the period from 1.4.85 to 31.3.86, the remark was 'fair'. Therefore, between last 10 years, the petitioner's service record was 'good' for 3 years, average for 2 years and 'fair' for one year. Therefore, the remark 'average' was not such by which it can be presumed that the petitioner was a dead wood and it was in public interest not to continue him in Government service. According to the petitioner therefore, the impugned order is passed on extraneous consideration without proper application of mind and also by not taking into consideration the relevant facts and circumstances and therefore, the order at Annexure.B

requires to be struck down. It is interesting to note that so far as the remarks of 1985-86 is concerned, the same were communicated to the petitioner on 30.7.1987. However, before the petitioner could make representation against the communication of the said remark, within a short span of time, the order at Annexure.B was passed. The petitioner, therefore, had no opportunity to make effective representation against the communication of the said remark and even without affording an opportunity to the petitioner to make representation against the said remarks, the impugned order of compulsory retirement at Annexure B was passed. There is no denial of the aforesaid aspect by the respondents, since the respondents have not filed any affidavit in reply denying the aforesaid allegation. Mr. Mehta learned AGP for the respondents also could not point out anything contrary to this. It is not in dispute that so far as the adverse remarks for the year 1985-86 are concerned, it was communicated to the petitioner on 30.7.87 and before the petitioner could make representation against the aforesaid remarks the impugned order dated 11.8.1987 at Annexure.B retiring the petitioner was passed. The petitioner , of course made a representation at Annexure-C dated 24.9.1987 against the aforesaid adverse remarks. However, before that the the impugned order was already passed by the respondent authorities and the petitioner has not been intimated as to what happened to the said representation. There is nothing on record to show as to what happened to the said representation. However, it is clear that before giving opportunity to the petitioner regarding the adverse remarks for the year 1985-86, the impugned order at Annexure-B was passed. Therefore, looking to the aforesaid facts as well as considering the last 10 years' service record of the petitioner, it cannot be said that retention of the petitioner in Government service was contrary to public interest or that he was absolutely a dead wood and there was no sense in continuing him in Government service. Therefore, assuming that the respondents were right in compulsorily retiring the petitioner at 50 years, then also on the ground as stated above, the order of compulsory retirement suffers from non application of mind and arbitrariness and therefore, the same deserves to be struck down.

##. It has been provided in the Resolution at Annexure.A under "Criteria to be followed" at page 15 of the petition, which provides as under:

"1. While reviewing the cases of officers attaining the age of fifty years, the following

points should be taken into consideration;

1) Whether any disciplinary proceedings are pending or contemplated against the officer ?

In case of a Government servant whose integrity is in doubt, it would be appropriate to consider him for premature retirement irrespective of the assessment of his ability or efficiency in work. In other words even if an officer's performance is good, he is efficient and physically and mentally fit, he can be prematurely retired, if competent Authority comes to the conclusion that his integrity is doubtful.

ii) Whether the officer is physically as well as mentally fit for retention in service.

iii) Whether the whole service record of the officer is atleast Satisfactory. If an officer is physically and mentally fit and has earned SATISFACTORY confidential report i.e. not below the average standard, he should not be prematurely retired."

In fact it has been stated in the aforesaid criteria that if the service records of the officer is not below average standard, he should not be prematurely retired. If the officer is physically and mentally fit and has earned satisfactory Confidential Reports i.e. not below the average standard, he should not be prematurely retired. That would be applicable regarding the officer attaining the age of 50 years. However, regarding the service record is concerned, it has been provided that the Confidential Reports for the last 8 to 10 years should be good. However, said procedure is made applicable when the case of an employee is to be reviewed at the age of 55 years. However, since the case of the petitioner is reviewed at the age of 50, the criteria as stated above would apply. Therefore, also even as per the said criteria which is required to be followed, the petitioner's case does not fall in the same. Even on the said ground also the order compulsorily retiring the petitioner from service is required to be set aside.

##. Learned advocate for the petitioner has relied upon the judgment of the Apex Court in the case of Brij Mohan Singh Chopta vs. State of Punjab reported in AIR 1987 SC 948 and in paras 8 and 9 the Apex Court has held as under:

" We would now examine the appellant's service

record for the last 10 years. On a perusal of the same we find that the appellant was awarded adverse remarks for the year 1971-72 and 1972-73 and for the rest of the years he was not awarded any adverse remarks. On the other hand for the years 1974-75 and 1975-76 the reporting officer rated him as a 'very good' officer although the reviewing officer treated him as 'average'. In 1976-77 the reporting officer rated him as a 'good' officer while the reviewing officer rated him as an 'average'. For the year 1977-78, 1978-79 and 1979-80 the reviewing officer assessed his work and conduct 'good' During the last 5 years of his service the appellant had earned good entries which are commendable in nature. Except the two entries awarded to him for the years 1971-72, 1973-74 the appellant has not earned any adverse entry reflecting upon his work and conduct. It is significant to note that in none of these entries his integrity was doubted. So far as the adverse entries for the year 1971-72 and 1972-73 are concerned the appellant has asserted that even though he had filed representations in accordance with the rules against those entries, his representations had not been considered or disposed of, but the appropriate authority considered those entries against him. In the counter-affidavit filed on behalf of the State it is conceded that the appellant had filed representations against the aforesaid two entries but the two representations could not be disposed of as the representations were not traceable on the Government file. The fact however remarks that the appellant had filed representations against the aforesaid adverse entries and the receipt of the representations is admitted by the Government but those representations were kept pending.

9. The question which falls for consideration is whether the aforesaid two entries could be taken into consideration in forming the requisite opinion to retire prematurely the appellant from service. There is no doubt that whenever an adverse entry is awarded to a Government servant it must be communicated to him. The object and purpose underlying the communication is to afford an opportunity to the employee to improve his work and conduct and to make representation to the authority concerned against those entries. If such representation is made it is imperative

that the authority should consider the representation with a view to determine as to whether the contents of the adverse entries are justified or not. Making of a representation is a valuable right to a Government employee and if the representation is not considered, it is bound to affect him in his service career, as in Government service grant of increment, promotion and ultimately premature retirement all depend on the scrutiny of the service records. in Gurdial Singh Fiji vs. State of Punjab (1979) 3 SCR 518 :(AIR 1979 SC 1622) the appellant therein was denied promotion on account of certain adverse entries against which he had made representation to the Govt.. but for some some reason or the other those representations could not be considered or disposed of. In view of those adverse entries he was not selected for promotion. This Court while considering the effect of non-consideration of the representation observed (at p. 1626 of AIR)

" The principle is well settled that in accordance with the rules of natural justice, an adverse report in confidential roll cannot be acted upon to deny promotional opportunities unless it is communicated to the person concerned so that he has an opportunity to improve his work and conduct or to explain the circumstances leading to the report. Such an opportunity is not an empty formality, its object, partially, being to enable the superior authorities to decide on a consideration of the explanation offered by the person concerned, whether the adverse report is justified. Unfortunately, for some reason or another, not arising out of any fault on the part of the appellant, though the adverse report was communicated to him, the Government has not been able to consider his explanation and decide whether the report was justified."

##. In the instant case as stated earlier from 1.4.75 to 17.2.76 and 1.4.83 to 31.3.84 the entries in the service record of the petitioner were "good" and from 1.4.83 to 31.3.83 the adverse remarks were not communicated . Therefore, it is presumed that it was not adverse to the petitioner and from 31.3.82 to 27.12.82 and from 1.4.84 to 31.3.84 the remark was 'average' and for the period from 1.4.85 to 31.3.86 the remark was 'fair' . The

petitioner was not given any opportunity to make representation against the said remark for the period between 1,4,85 to 31.3.86 and without allowing the petitioner to make representation within the time limit prescribed, the impugned order was passed and therefore, that entry could not have been taken into consideration before passing the order. Since the Government has not filed any reply it is not possible to come to the conclusion which part of the service record or which entry in the service record of the petitioner was taken into consideration for passing the impugned order. It is also not shown as to what other consideration weighed with the Government in passing the impugned order. Even for the last entry, the explanation of the petitioner was not sought for and he was not allowed to make a representation before passing the impugned order. Therefore, on the aforesaid ground also the impugned order is required to be struck down as it suffers from unreasonableness and suffers from the vice of arbitrariness.

##. Said order has been passed on extraneous consideration without following the procedure prescribed by the Government for review and therefore, the same shall have to be set aside. Even as per the averments made in the petition, the petitioner cannot be branded as a dead wood and it cannot be said that it is not in public interest to continue him on the post in question. On the aforesaid ground also the impugned order is required to be quashed and set aside.It is also to be noted that the petitioner was not subjected to any departmental inquiry proceedings when he was ordered to be retired compulsorily. The physical and mental condition of the petitioner were good and he was fit to be continued in service.

##. Thus the total effect is that the petitioner will be treated to be in continuous Government service till the age of his superannuation. It has been stated at the bar by the learned advocate for the petitioner that he has reached his superannuation age of 58 years long back. Therefore, the respondents are directed to give to the petitioner all consequential benefits which otherwise he would have been entitled to if he had remained in service upto 58 years. Since the petitioner has already retired on reaching his age of superannuation which is 58 years, there is no question of reinstating the petitioner in service. Accordingly the respondents are directed to give to the petitioner the benefits of his pay and all other consequential benefits upto the date of his superannuation as he will be treated in service upto that

age without any break and he will also be entitled to salary,allowances and such other benefits as may be admissible to him under the Rules. If the petitioner has accepted the amount equivalent to his pay and allowances for 3 months in lieu of 3 months' notice, the same may be returned to the respondents or adjusted while calculating the amount of difference required to be paid to the petitioner on the basis of this judgment.

##. Since the petition is pending since 1987 the respondents are directed to comply with the directions contained in this judgment within two months from the date of receipt of the writ of this court. Rule is made absolute with no order as to costs.